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TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	10/078,614
	Filing Date	February 19, 2002
	First Named Inventor	Bass, Ralph L.
	Group Art Unit	1617
	Examiner Name	Yu, Gina C.
Total Number of Pages in This Submission	Attorney Docket Number	014123-000010

ENCLOSURES (check all that apply)

<input checked="" type="checkbox"/> Fee Transmittal Form <input checked="" type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment / Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Documents <input type="checkbox"/> Response to Missing Parts/ Incomplete Application <input type="checkbox"/> Response to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____	<input type="checkbox"/> After Allowance Communication to Group <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input checked="" type="checkbox"/> Appeal Communication to Group (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): Acknowledgement Postcard Check in the amount of \$165.00
Remarks		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm or Individual Name	JENNIFER L. SKORD, (REG. NO. 30,687) MOORE & VAN ALLEN
Signature	
Date	February 26, 2004

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FEE TRANSMITTAL for FY 2004

Effective 10/01/2003. Patent fees are subject to annual revision.

☒ Applicant claims small entity status. See 37 CFR 1.27

TOTAL AMOUNT OF PAYMENT (\$165.00)

Complete If Known

Application Number	10/078,614
Filing Date	February 19, 2002
First Named Inventor	Bass, Ralph L.
Examiner Name	Yu, Gina C.
Art Unit	1617
Attorney Docket No.	014123-000010

METHOD OF PAYMENT (check all that apply)

☒ Check ☐ Credit Card ☐ Money Order ☐ Other ☐ None☐ Deposit Account:Deposit
Account
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Deposit
Account
Name

13-4365

Moore & Van Allen, PLLC

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☐ Charge fee(s) indicated below ☒ Credit any overpayments☒ Charge any additional fee(s) or any underpayment of fee(s)☐ Charge fee(s) indicated below, except for the filing fee to the above-identified deposit account.

FEE CALCULATION

1. BASIC FILING FEE

Large Fee Code	Entity Fee (\$)	Small Fee Code	Entity Fee (\$)	Fee Description	Fee Paid
1001	770	2001	385	Utility filing fee	
1002	340	2002	170	Design filing fee	
1003	530	2003	265	Plant filing fee	
1004	770	2004	385	Reissue filing fee	
1005	160	2005	80	Provisional filing fee	

SUBTOTAL (1) (\$)

2. EXTRA CLAIM FEES FOR UTILITY AND REISSUE

Total Claims	Extra Claims	Fee from below	Fee Paid
	-20**=	x	
Indep. Claims	-3**=	x	
Multiple Dependent			

Large Fee Code	Entity Fee (\$)	Small Fee Code	Entity Fee (\$)	Fee Description
1202	18	2202	9	Claims in excess of 20
1201	86	2201	43	Independent claims in excess of 3
1203	290	2203	145	Multiple dependent claim, if not paid
1204	86	2204	43	** Reissue independent claims over original patent
1205	18	2205	9	** Reissue claims in excess of 20 and over original patent

SUBTOTAL (2) (\$)

**or number previously paid, if greater; For Reissues, see above.

FEE CALCULATION (continued)

3. ADDITIONAL FEES

Large Fee Code	Entity Fee (\$)	Small Fee Code	Entity Fee (\$)	Fee Description	Fee Paid
1051	130	2051	65	Surcharge - late filing fee or oath	
1052	50	2052	25	Surcharge - late provisional filing fee or cover sheet	
1053	130	1053	130	Non-English specification	
1812	2,520	1812	2,520	For filing a request for <i>ex parte</i> reexamination	
1804	920*	1804	920*	Requesting publication of SIR prior to Examination action	
1805	1,840*	1805	1,840*	Requesting publication of SIR after Examiner action	
1251	110	2251	55	Extension for reply within first month	
1252	420	2252	210	Extension for reply within second month	
1253	950	2253	475	Extension for reply within third month	
1254	1,480	2254	740	Extension for reply within fourth month	
1255	2,010	2255	1,005	Extension for reply within fifth month	
1401	330	2401	165	Notice of Appeal	
1402	330	2402	165	Filing a brief in support of an appeal	165.00
1403	290	2403	145	Request for oral hearing	
1451	1,510	1451	1,510	Petition to institute a public use proceeding	
1452	110	2452	55	Petition to revive - unavoidable	
1453	1,330	2453	665	Petition to revive - unintentional	
1501	1,330	2501	665	Utility issue fee (or reissue)	
1502	480	2502	240	Design issue fee	
1503	640	2503	320	Plant issue fee	
1406	130	1460	130	Petitions to the Commissioner	
1807	50	1807	50	Processing fee under 37 CFR 1.17(q)	
1806	180	1806	180	Submission of Information Disclosure Stmt	
8021	40	8021	40	Recording each patent assignment per property (times number of properties)	
1809	770	2809	385	Filing a submission after final rejection (37 CFR § 1.129(a))	
1810	770	2810	385	For each additional invention to be examined (37 CFR § 1.129(b))	
1801	770	2801	385	Request for Continued Examination (RCE)	
1802	900	1802	900	Request for expedited examination of a design application	

Other fee (specify)

*Reduced by Basic Filing Fee Paid

SUBTOTAL (3) (\$165.00)

SUBMITTED BY

Complete (If applicable)

Name (Print/Type)	Jennifer L. Skord	Registration No. (Attorney/Agent)	30,687	Telephone	(919) 286-8000
Signature				Date	02/26/2004

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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application Number : 10/078,614 Confirmation No.: 5599
In re application of : Bass, Ralph L.
Filed : February 19, 2002
Art Unit : 1617
Examiner : Gina C. Yu
Docket Number : 014123-000010
Customer No. : 24239

Title : METHOD FOR TREATING CELLULITE

Mail Stop: APPEAL
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

APPEAL BRIEF UNDER 37 CFR 1.192

Sir:

This is an Appeal from the Final Rejection dated November 4, 2003. A Notice of Appeal was filed January 8, 2004, setting a 2-month term up to and including **March 8, 2008** for filing the Appeal Brief.

The Appeal Brief and its attachment of the Appendix (of claims 1 – 15 on Appeal) are enclosed in triplicate.

Also enclosed is a \$165.00 check (Small Entity Status) for the fee for the Appeal Brief.

REAL PARTY IN INTEREST

The real party in interest is the inventor, Ralph L. Bass.

RELATED APPLICATIONS

There are no other Appeals nor interferences known to appellant or appellant's legal representative which will directly affect or be directly affected by or have a bearing on the Board's decision in the instant pending Appeal.

STATUS OF CLAIMS

Claims 1 – 13 have not been amended and are the same claims as originally filed in the instant application no. 10/078,614.

By Amendment dated August 8, 2003, the phrase - - of the kind - - was inserted between "ingredient" and "naturally" both occurrences in claim 14 and one occurrence in claim 15.

Claims 1 – 12 stand finally rejected under 35 U.S.C. §103(a) as being unpatentable over Friedrichs (DE Utility Model No. 296 16 496, as translated from German into English, translation provided by the Examiner) in view of Taylor et al. (US Patent No. 5,869,104) and New York Daily News (July 19, 2001).

Claim 13 stands finally rejected under 35 U.S.C. §103(a) as being unpatentable over Friedrichs, Taylor et al. '104, and New York Daily News as applied to claims 1 – 12 above, and further in view of Koike et al. (US Patent No. 6,461,623).

Claims 14 and 15 stand finally rejected under 35 U.S.C. §103(a) as being unpatentable over Friedrichs (DE Utility Model No. 296 16 496, as translated from German into English) in view of Taylor et al. (US Patent No. 5,869,104) and New York Daily News (July 19, 1991) as applied to claims 1 – 12 above, and further in view of Aldrich (1996).

STATUS OF AMENDMENTS AFTER FINAL REJECTION

No amendments were filed subsequent to Final Rejection.

SUMMARY OF THE INVENTION

Appellant's claimed method is directed to treatment of skin affected with cellulite. The method comprises applying a solid block formulation by *gently gliding* it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin. The solid block formulation comprises a salt selected from the group consisting of sodium chloride (NaCl), potassium chloride (KCl), and combination thereof. The applied salt is allowed to remain on the affected skin.

ISSUES

Regarding claims 1 – 12, does the combination of 3 references teaching to massage deeply with rollers and suction (New York Daily News) using a NaCl block for topical treatment for infections (Taylor et al.) so that the massage with the topical infection treatment causes peeling of the cellulite-affected skin (Friedrichs) render obvious the present invention which requires that a solid block of NaCl and/or KCl is applied by *gently gliding* it over cellulite-affected skin in a manner insufficient to cause abrasion and debridement of the affected skin, the cellulite being a honeycomb appearance on a skin area caused by fat tissue, not an infection of the skin.

Regarding claim 13, does adding Koike '623, which teaches a massage composition of zeolite (which becomes warm upon hydration), polyhydric alcohol, and copolymers of methacrylic acid, and optionally, NaCl or KCl may be added for a scrubbing effect and skin contracting effect, to the combination of New York Daily News, Taylor et al., and Friedrichs, render obvious claim 13, which depends on independent claim 1 and further requires the presence of KCl with a weight ratio amount of Na:K up to about 1:1?

Regarding claims 14 and 15, does adding Aldrich, which teaches that high purity NaCl contains trace amounts of phosphate ions, to the combination of New York Daily News, Taylor

et al., and Friedrichs, render obvious claim 14, which depends on independent claim 1 and further requires the presence of another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid, or render obvious claim 15, which depends on dependent claim 14 and further requires that the other ingredient is selected from potassium carbonate, potassium protein complexes, potassium phosphate, sodium carbonate, sodium protein complexes, and/or sodium phosphate, with the total amount of the other ingredients being less than about 45% by weight.

GROUPING OF CLAIMS

The claims stand or fall together.

ARGUMENT

Overview

Appellant respectfully reiterates, as stated in the Amendment responsive to the first Official Action, independent claim 1 in clause (B) specifically requires applying the solid block of a salt selected from the group consisting of NaCl, KCl, and a combination thereof to the cellulite-affected skin by gently gliding the solid block over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin. Additionally, lines 27 – 29 of page 4 of appellant's specification and line 5 of page 10 of applicant's specification both also state that the inventive method requires applying the solid block to the affected skin by gently gliding the solid block over the affected skin, in a manner insufficient to cause abrasion and debridement of the affected skin. Also, lines 4 and 5 of page 10 of appellant's specification state that care must be taken so that gently gliding the NaCl and/or KCl over the affected skin is in a manner insufficient to cause abrasion and debridement of the affected skin.

Rejection of claims 1 – 12 under 35 U.S.C. §103(a)

In the Final Rejection, the Examiner maintained the rejection of claims 1 – 12 under 35 U.S.C. §103(a) as being unpatentable over Friedrichs in view of Taylor et al. and New York Daily News.

Appellant respectfully reiterates, as stated in the Amendment responsive to the first Official Action, Friedrichs teaches a cellulite peeling emulsion of orange oil, milk serum [whey], sea salt (55 – 65%), and an emulsifying ointment (Ungentum aqueous). The paragraph at lines 5 – 9 of page 4 of appellant’s specification discusses that such creamy ointments have a major drawback of a greasy-feeling residue. Besides being an ointment that can leave a greasy feel, Friedrichs has the additional drawback of the unsightliness of the peeling.

In contrast, the formulation in appellant’s claimed method comprises a solid block, not an ointment, and also the formulation is not a cellulite peeling composition. As noted above, appellant’s independent claim 1 clearly states that the solid block formulation is applied by “*gently gliding* it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin”. There is no peeling in the present invention. Since Friedrichs is teaching a debriding ointment for peeling the skin, the teaching is away from the present invention which specifically does not abrade nor debride.

The Examiner now states in the Final Rejection:

Examiner respectfully disagrees with applicants’ [*sic*, applicant’s] interpretation of the Friedrichs patent. While applicants describe [*sic*, applicant describes] the prior art as a method of physical “peeling” [*sic*, of] the skin affected by cellulite, the reference in fact teaches the cellulite is treated by “*stimulating* the lymph flow”, which examiner views is massaging. [Italicized bold in original.] Thus examiner maintains the position that it is well known in the art to treat cellulite by massaging the affected skin with sea salts.

Yes, the Examiner is correct that Friedrichs states the cellulite is treated by a lymph-flow stimulating effect, but the Examiner is now ignoring that Friedrichs also teaches a cellulite peeling emulsion and there is no peeling in the present invention.

As the Examiner should be well aware, it is impermissible to pick and to choose only parts of what is disclosed in a reference while ignoring the other parts. As stated in *In Re Wesslau*, 147 U.S.P.Q. 391 (at 393):

It is impermissible within the framework of Section 103 to pick and choose from any one reference only so much of it as will support a given position, to the full exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art.

Appellant has previously stated that his claimed method has no peeling, no massaging, and no emulsion. Appellant now also states that his claimed method has no lymph-flow stimulating effect. Appellant's claimed method requires gentle gliding of a solid block.

Appellant now summarizes the comments vis-à-vis the other two references, Taylor et al. (US Patent No. 5,869,104) and New York Daily News (July 19, 2001), as stated in the Amendment responsive to the first Official Action.

Appellant Bass is a co-inventor of Taylor et al. (US Patent No. 5,869,104), which is discussed on page 9 of the instant specification. In one embodiment of Taylor et al., a solid block of NaCl is applied gently to the skin in a topical method to treat skin conditions that are infections, for instance, impetigo.

Taylor et al. are not general to any and all conditions of the skin, but rather specifically teach topical treatment of infectious skin conditions. Various topical treatments for skin infections are commercially available in the prior art, but to the best of appellant's knowledge, none of them is also marketed for topical treatment of cellulite.

The fact that a topical composition works for skin infections does not make obvious to the person of ordinary skill in the art that the topical composition will work for cellulite because cellulite is not an infection of the skin. The paragraph at the top of page 3 of the instant specification clearly explains that cellulite is from fat (adipose tissue) and retained water, resulting in the cellulite-affected skin having a honeycomb pattern in a given area of the skin that tends to bulge.

Thus, the teaching of Taylor et al. is irrelevant to the present invention, which is topical treatment of skin having a honeycomb look caused by the arrangement of adipose tissue and water, namely cellulite-affected skin.

The Examiner has consistently ignored that the skin conditions treated by the NaCl block in Taylor et al. are infections, and consistently ignored that cellulite is not an infection.

New York Daily News teaches mechanical massage, with rollers and suckers, on pigs, for treating cellulite. In New York Daily News, there is no topically applied formulation

whatsoever. Such endomologie that is a deep massage by rolling and suction to smooth the clumping of fat from cellulite is discussed in the paragraph at lines 11 – 14 of page 4 of the instant specification.

As stated before, the method of claim 1 is with a solid block of NaCl and/or KCl, and the solid block is not applied with a deep massage by rolling and suction to smooth the clumping of fat. Claim 1 clearly states that the solid block is applied by “*gently gliding* it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin”.

The Examiner has consistently ignored that New York Daily News teaches deep massage by rolling and suction to smooth the clumping of fat caused by cellulite, and consistently ignored that there is no deep massage by rolling nor any suction in the present invention.

The Examiner now states in the Final Rejection:

In response to applicant’s arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on a combination of references. ...In this case, applicants argue [*sic*, applicant argues] by distinguishing the individual reference with the claimed invention. ... Examiner views that applicants have [*sic*, applicant has] not addressed the issue of the case, which is whether, given the teaching to treat cellulite by stimulate [*sic*, stimulating] lymph flow by using sea salt composition and/or by massaging, a routineer [*sic*, person of ordinary skill in the art] would have been motivated to use the Taylor [*sic*, Taylor et al.] salt block, which is also known to treat skin conditions, to stimulate lymph flow and thus to treat cellulite.

Appellant respectfully traverses as he indeed did argue by distinguishing the present invention from the combination of the references, and appellant quotes from the Amendment responsive to the first Official Action as follows:

Thus, what is obvious from the combination of these 3 references is to massage deeply, with rollers and suction, using a topical treatment for infections, so that the massage with the topical infection treatment causes peeling of the cellulite-affected skin. This is most certainly a teaching away from the present invention of claims 1 – 12 and cannot possibly render these claims obvious.

Apparently, the Examiner is picking and choosing only parts of appellant’s arguments from the Amendment responsive to the first Official Action while ignoring the other parts, just as the

Examiner is picking and choosing only parts of what is disclosed in a reference while ignoring the other parts.

Moreover, for the following additional reasons, the combination of these 3 references does not render obvious any of dependent claims 2, 5, and 6.

Dependent claim 2 requires about 95 – 100 % NaCl and/or KCl. Friedrichs has only 55 – 65 % sea salt.

Dependent claim 5 requires that the block of NaCl and/or KCl is free of a carrier. Friedrichs has ointment (Ungentum aqueous) as a carrier.

Dependent claim 6 requires that the block of NaCl and/or KCl is free of other topical medicaments and cosmetics for topical treatment of cellulite. Friedrichs has orange oil and milk serum.

Accordingly, appellant respectfully requests the Board to instruct the Examiner to withdraw the rejection of claims 1 – 12 under 35 U.S.C. §103(a) over Friedrichs, Taylor et al., and New York Daily News.

Rejection of claim 13 under 35 U.S.C. §103(a)

Next in the Final Rejection, the Examiner maintained the rejection of dependent claim 13 under 35 U.S.C. §103(a) as being unpatentable over Friedrichs, Taylor et al., and New York Daily News as applied to claims 1 – 12 above, and further in view of Koike et al.

Dependent claim 13 is directed to an embodiment with the NaCl and KCl in a weight ratio amount of Na:K up to about 1:1. Thus, dependent claim 13 requires the presence of KCl.

The above comments, vis-à-vis Friedrichs, Taylor et al., and New York Daily News in combination teaching to massage deeply, with rollers and suction, using a NaCl block composition for topical treatment of infections, so that the massage with the topical infection treatment causes peeling of the cellulite affected skin, are incorporated here by reference.

Furthermore, there is no KCl in either of Friedrichs or Taylor et al., and certainly not in New York Daily news which is silent vis-à-vis any formulation whatsoever.

Koike et al. teach a massage composition of zeolite (which becomes warm upon hydration), polyhydric alcohol, and copolymers of methacrylic acid. NaCl and/or KCl are optional, and if added, are added for a scrubbing effect and skin contracting effect.

The Examiner now states that:

With regards to the rejection over Friedrichs, Taylor [*sic*, Taylor et al.], and New York Daily News and further in view of Koike [*sic*, Koike et al.], applicants assert [*sic*, applicant asserts] that the method of “scrubbing” is different from the claimed method of “gently gliding” the solid salt block, [*sic*, and] examiner views that there is no patentable distinction between the two methods because both methods are used to produce massaging effect on the skin.

As noted above, appellant’s independent claim 1 clearly states that the solid block is applied by “*gently gliding* it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin”. There is no scrubbing in the present invention.

Moreover, scrubbing is not a type of massage nor does scrubbing produce a massaging effect, and regardless, the claimed method has no massaging.

Since Koike et al. are teaching a debriding composition for scrubbing the skin in their optional embodiment with NaCl or KCl, the teaching is away from the present invention which specifically does not abrade nor debride.

The Examiner has consistently ignored that Koike et al. teach that NaCl and/or KCl are optionally added for a scrubbing effect, and consistently ignored that the NaCl and/or KCl are not optional in the present invention and there is no scrubbing in the present invention.

The only teaching that adding Koike et al. to Friedrichs, Taylor et al., and New York Daily News would do is that the combination of the 4 references would teach to massage deeply, with rollers and suction, and also with scrubbing, using a NaCl block for topical treatment of infections, and also using zeolite that heats up when hydrated, so that the massage with the topical infection/zeolite heat treatment causes peeling of the cellulite affected skin. This is most certainly a teaching away from the present invention of dependent claim 13 and cannot possibly render this claim obvious.

Accordingly, appellant respectfully requests the Board to instruct the Examiner to withdraw the rejection of dependent claim 13 under 35 U.S.C. §103(a) over Friedrichs, Taylor et al., New York Daily News, and Koike et al..

Rejection of claims 14 and 15 under 35 U.S.C. §103(a)

Last in the Final Rejection, the Examiner maintained the rejection of claims 14 and 15 under 35 U.S.C. §103(a) as being unpatentable over Friedrichs in view of Taylor et al. and New York Daily News as applied to claims 1 – 12 above, and further in view of Aldrich.

Claims 14 depends on independent claim 1 and is directed to an embodiment where the solid block of NaCl and/or KCl comprises another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid. Claim 15 depends on dependent claim 14 and is directed to the other ingredient being selected from potassium carbonate, potassium protein complexes, potassium phosphate, sodium carbonate, sodium protein complexes, and/or sodium phosphate, and the total amount of the other ingredients being less than about 45% by weight.

The comments above, vis-à-vis Friedrichs, Taylor et al., and New York Daily News in combination teaching to massage deeply, with rollers and suction, using a composition that topically treats infections, so that the massage with the topical infection treatment causes peeling of the cellulite affected skin, are incorporated here by reference.

Furthermore, there is no human extracellular fluid nor human intracellular fluid in either of Friedrichs or Taylor et al., and certainly not in New York Daily news which is silent vis-à-vis any formulation whatsoever.

Aldrich is a supply catalogue from this company, the catalog being for purchasing bulk quantities of materials such as NaCl and/or KCl, where the cited catalog pages specifically mention NaCl and KCl. The catalog page for NaCl notes that high purity NaCl contains trace amounts of phosphate ions, which is well known. The Aldrich catalog pages are silent about ingredients of the kind naturally present in human extracellular fluid and/or in human intracellular fluid.

The well known fact that high purity NaCl contains trace amounts of phosphate ion does not mean that the Aldrich catalog pages are teaching or even suggesting the optional addition another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid into a formulation for the topical treatment of cellulite.

As noted, it is well known that high purity NaCl contains certain impurities and is not 100% NaCl. That is not the point.

Rather, the point is that the only teaching that adding the Aldrich catalog pages to Friedrichs, Taylor et al., and New York Daily News would do is that the combination of the 4 references would teach to massage deeply, with rollers and suction, using a topical treatment for infections, and so that the massage with the topical infection treatment causes peeling of the cellulite affected skin, and by the way, “high purity” NaCl contains a few impurities such as phosphate ion. This is most certainly a teaching away from the present invention of claims 14 and 15 and cannot possibly render these claims obvious.

The Examiner now states in the Final Rejection:

The fact that Aldrich does not mention whether NaCl or KCl are [*sic*, is] naturally found in human extracellular or intracellular fluid is irrelevant. The lack of such teaching does not change the fact that these salts are inherently present in the human extracellular/intracellular fluid. While applicants dismiss [*sic*, applicant dismisses] the issue of whether the high purity NaCl contains certain impurity [*sic*, impurities] such as phosphate ions, examiner views that the issue in rejection made further in view of Aldrich precisely is whether it would have been obvious to a skilled artisan that phosphate ions are present in the Taylor [*sic*, Taylor et al.] salt block; which applicants concede [*sic*, applicant concedes].

Appellant respectfully points out that, in the Amendment responsive to the first Official Action, appellant did not state that “Aldrich does not mention whether NaCl or KCl are naturally found in human extracellular or intracellular fluid”. Rather, appellant stated that “The Aldrich catalog pages are silent about ingredients of the kind naturally present in human extracellular fluid and/or in human intracellular fluid”.

Appellant finds rather strange the Examiner’s belief that it is irrelevant that there is a lack of teaching in Aldrich as to what ingredients are naturally found in human extracellular or in human intracellular fluid. This belief is strange because the Examiner has employed Aldrich in a rejection of claims that specifically require the presence of another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid. Hence, contrary to the Examiner’s allegation, this lack of teaching in Aldrich is most certainly relevant.

Furthermore, appellant respectfully notes that it is not the point as to whether it would have been obvious to a skilled artisan that phosphate ions are present in the Taylor et al. salt block, as that is not what is claimed in claims 14 and 15. Rather, the issue is whether Aldrich is

teaching or even suggesting the addition another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid into a solid block formulation of NaCl and/or KCl in a method for the topical treatment of cellulite where the solid block formulation is applied by “*gently gliding* it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin”.

As the Examiner should be well aware, it is impermissible to employ hindsight. As stated in *Hodosh v. Block Drug Co.*, 786 F.2d 1136 (at 1143) (Fed. Cir. 1986), the U.S. Court of Appeals for the Federal Circuit held that the references must be considered as a whole and suggest the desirability and thus obviousness of making the combination, and the references must be reviewed without benefit of hindsight vision afforded by the claimed invention.

The Aldrich reference simply cannot teach nor suggest the very thing about which the Aldrich reference is silent.

Appellant has previously stated that his claimed method has no peeling, no massaging, and no emulsion. Appellant’s claimed method, with another ingredient of the kind of naturally present in human extracellular fluid and/or in human intracellular fluid as per claims 14 and 15, still requires gentle gliding of a solid block.

Accordingly, appellant respectfully requests the Board to instruct the Examiner to withdraw the rejection of claims 14 and 15 under 35 U.S.C. §103(a) over Friedrichs, Taylor et al., New York Daily News, and the Aldrich catalog pages.

CONCLUSION

In view of the above remarks, appellant respectfully submits and requests the following. Appellant requests the Board to instruct the Examiner to withdraw the claim rejections under 35 U.S.C. §103(a). Appellant submits the claims distinguish over the cited references in any combination. Hence, appellant submits the present application is in proper condition for allowance, and requests the Board to instruct the Examiner to forward an official notification of allowance.

DEPOSIT ACCOUNT

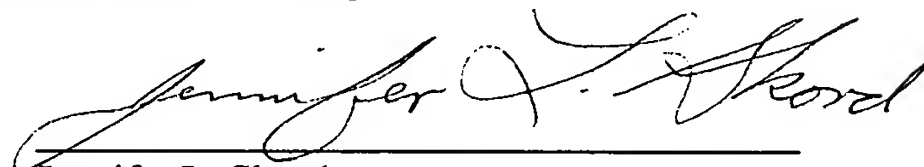
Although a check in the amount of \$165.00 (Small Entity Status) is enclosed for the fee for the Appeal Brief, and thus it is believed no fee is due, the Commissioner hereby is authorized to charge any deficiencies of payment associated with this Communication, or to credit any overpayment, to **Deposit Account No. 13-4365**.

Respectfully submitted,

Moore & Van Allen PLLC

Date: February 26, 2004

By:



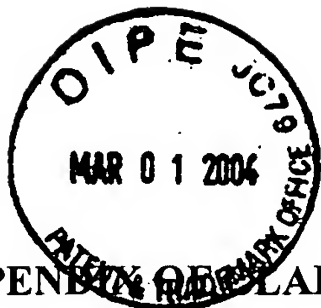
Jennifer L. Skord

Registration Number: 30,687

Moore & Van Allen
Suite 800
2200 West Main Street
Durham, NC 27705
Telephone: 919-286-8000
Facsimile: (919) 286-8199

Enclosures:

In triplicate, Appeal Brief and its Appendix (of claims 1 – 15 on Appeal)
\$165.00 check (Small Entity Status fee for Appeal Brief)



APPENDIX 1 CLAIMS ON APPEAL (Application No. 10/078,614)

1. A method for the topical treatment of skin affected with cellulite comprising the steps of:

- (A) selecting a solid block formulation comprising a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof,
- (B) applying the solid block by gently gliding it over the affected skin in a manner insufficient to cause abrasion and debridement of the affected skin,
- (C) allowing the applied salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof to remain on the affected skin, and
- (D) achieving an improvement in the cellulite.

2. The method of claim 1, wherein the block contains about 95% to about 100% of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof.

3. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof is free of other mineral salts except for trace amounts of the other mineral salts.

4. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof comprises another ingredient selected from the group consisting of a salt of Mg, Ca, S, P, Zn, Mn, Fe, Cr, I, Cu, Co Se, and combinations thereof, in a total amount up to 20% by weight.

5. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof is free of a carrier.

6. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof is free of other topical medicaments and cosmetics for the topical treatment of cellulite.

APPENDIX OF CLAIMS ON APPEAL (Application No. 10/078,614)

7. The method of claim 1, wherein gliding the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof over the affected skin is accomplished by gentle rubbing motions selected from the group consisting of dabbing motions, circular motions, up and down motions, zigzag motions, and combinations thereof.

8. The method of claim 1, wherein gliding the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof over the affected skin is accomplished in about 50 seconds to about 1 second.

9. The method of claim 8, wherein gliding the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof over the affected skin is accomplished in about 45 seconds to about 2 seconds.

10. The method of claim 1, wherein the applied salt from the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof forms a film on the affected skin.

11. The method of claim 1, wherein prior to gliding the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof over the affected skin in step (B), the affected skin is pre-moistened with water, and then, gliding the block of sodium chloride, potassium chloride, and a combination thereof over the affected skin results in the sodium chloride, potassium chloride, and combination thereof becoming wet, and then in step (C), the wetted applied sodium chloride, potassium chloride, and combination thereof remaining on the affected skin is allowed to dry on the affected skin.

12. The method of claim 1, wherein steps (A), (B), and (C) are accomplished at least once per day.

APPENDIX OF CLAIMS ON APPEAL (Application No. 10/078,614)

13. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof comprises sodium chloride and potassium chloride in a weight ratio amount of Na:K up to about 1:1.

14. The method of claim 1, wherein the block of a salt selected from the group consisting of sodium chloride, potassium chloride, and a combination thereof comprises another ingredient selected from the group consisting of an ingredient of the kind naturally present in human extracellular fluid, an ingredient of the kind naturally present in human intracellular fluid, and a combination thereof.

15. The method of claim 14, wherein the ingredient of the kind naturally present in human fluid is selected from the group consisting of potassium carbonate, potassium protein complexes, potassium phosphate, sodium carbonate, sodium protein complexes, sodium phosphate, and combinations thereof, where the total amount of said other ingredients is less than about 45% by weight, based on the weight of the block of sodium chloride, potassium chloride, and a combination thereof.